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June 21, 1993

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms. Donna R. Searcy  
Secretary  
Federal Communications Commission  
OMD, Room 222, Stop Code 1170  
1919 M Street, N.W.  
Washington, D.C. 20554

RE: MM Docket No. 92-266

Dear Ms. Searcy:

TKR Cable Company and TKR Cable of Kentucky, by its attorneys, submit an original and eleven (11) copies of their Petition for Reconsideration in MM Docket 92-266.

If there are any questions about the enclosed, please feel free to contact the undersigned.

Sincerely,

*Mark J. Palchick*

Mark J. Palchick

MJP:btc:clnt/searcy.621

Enclosures

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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	
and Competition Act of 1992	)	MM Docket No. 92-266
Rate Regulation		

**PETITION FOR RECONSIDERATION**

TKR Cable Company ("TKR") and TKR Cable of Kentucky (TKRCC), by their attorneys, and pursuant to Section 1.429 of the Commission's rules, respectfully submit this Petition For Reconsideration of the Commission's Order in MM Docket 92-266 ("Rate Order").

TKR and TKRCC's Petition is limited to one aspect of the Rate Order, although they reserve the right to comment as applicable on other Petitions for Reconsideration that may be filed in this proceeding. TKR is a multiple system operator and provides cable television service in the states of New York and New Jersey. TKRCC is a multiple system operator and provides cable television service in the state of Kentucky. TKR and TKRCC seek reconsideration of the Commission decision that taxes and franchise related costs can not, with the exception of franchise fees, be passed through to cable subscribers without a cost of service

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The Commission recognized in paragraph 254 of the Rate Order that the 92 Cable Act<sup>1</sup> required the Commission, in setting basic rates, to take into consideration:

"(1) taxes and fees imposed by any state or local authority on any transactions between cable operators and subscribers; (2) assessments of general applicability imposed by a government entity applied against cable operators or cable subscribers; (3) the cost of satisfying franchise requirements to support public, educational, and governmental access channels or the use of such channels or any other services required under the franchise; and (4) the costs of any public, educational, and governmental access programming required by the franchising authority."<sup>2</sup>

The Commission further concluded that it "should exclude from the cap taxes imposed on the provision of cable television service, franchise fees, and the costs of satisfying franchise requirements."<sup>3</sup> This statement would seem to indicate that a cable operator can pass through directly to subscribers a pro rata share of such costs in addition to the per channel charge permitted under the benchmark (the "line 600" charge). However, at paragraph 257 of the Rate Order the Commission states "Thus our measure of comparison to competitive rates include most categories of external costs and the resulting permitted rates will also include these costs." Therefore it would

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<sup>1</sup>. Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("92 Cable Act").

<sup>2</sup>. Rate Order at paragraph 254

<sup>3</sup>. Id.

appear that a cable operator is prohibited from passing through these costs to subscribers in addition to the permitted rate established pursuant to the form 393. If the intent of the Commission was to allow the pass through of these costs, TKR and TKRCC respectfully request the Commission to issue a clarification.<sup>4</sup> If, however, the Commission's intent is to not permit the pass through of these costs over and above the "line 600" permitted rate, then it is respectfully requested that the Commission reconsider this determination. It is contrary to the express provisions of the 92 Cable Act and is not adequately covered in form 393.

The Commission is required to consider in any rate the amounts assessed as franchise fees, taxes on transactions with subscribers, taxes of general applicability imposed on operators, and the cost of complying with franchise requirements.<sup>5</sup> This was recognized by the Commission at paragraph 254 of the Rate Order. However in the survey form sent to operators pursuant to FCC order 92-545, no data was collected concerning any exogenous fees or costs, with the exception of franchise fees and fees specifically applicable to cable operators. Thus the FCC has no basis for its assumption that these other external costs were included in

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<sup>4</sup>. This is particularly confusing because the entire discussion of external cost is contained within the section on permitted increases above the September 30th rates.

<sup>5</sup>. Section 623 (b)(2)(C)(v & vi).

their bench mark analysis. To the contrary there is not even any data to suggest that the systems examined by the FCC paid property taxes, were subject to possessory interest taxes, or had franchise imposed costs for PEG access.

Even if the FCC had collected data on theses external costs there would be no way to make any conclusions of general applicability. Typically sales taxes vary on a state by state and some times municipality by municipality basis<sup>6</sup>. Taxes of general applicability range from possessory interest type taxes in California and New York, to taxes on the perceived resale value of the system in Kentucky. In one state alone the amount of utility user taxes ranges from a low of three percent to a high of ten percent.<sup>7</sup> The amount of franchise imposed costs are even more system specific. Some smaller cable television systems have no franchise imposed costs. Other systems often have franchise imposed costs that include multimillion dollar access studios, high speed data institutional networks, and non-demand based build-out requirements.

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<sup>6</sup>. According to the 1990 annual report on Utility and Carrier regulation, published by the National Association of Regulatory Utility Commissioners, state sales taxes on intrastate telecommunication services vary from 0% to 7.5%; county sales taxes on intrastate communication services vary from 0% to 2%; and municipal sales taxes on intrastate telecommunication services vary from 0% to 5%.

<sup>7</sup>. Reply Comments of the California Cable Television Association in Docket 92-266 at pg. 3.

If the Commission requires that these costs be somehow averaged into a benchmark formula gross inequities contrary to sound public policy will result.<sup>8</sup> Those communities that are sensitive to the needs and interest of their residents will be penalized for not imposing non-demand based franchise costs because their benchmark rate could be based in part on the fact that some of the test systems in the Commission's sample have included these costs into their base rate. On the other hand, some cable operators will have their ability to make a reasonable profit severely hampered to the extent that the benchmark rate does not adequately compensate for their exogenous and easily identifiable non-discretionary costs. The likely result being that operators will be forced out of business or into making cost of service showings. In either event the subscriber will be forced to pay for service without regard to the benefit it receives. Such a result is directly contrary to the express intentions of the statute to lower

the "competitive rate" and because taxes imposed on the  
provision of cable television service. franchise fees. and



By allowing these costs to be separately charged the Commission will achieve an additional result mandated by the statute, Franchise and taxing authorities will be directly accountable for the costs they impose on cable subscribers. Accordingly for the reasons stated above, it is respectfully requested the reconsider its Rate Order and expressly permit Cable operators to pass through taxes of general applicability and franchise imposed costs in addition to the line 600 permitted rate.

Respectfully submitted,

TKR CABLE COMPANY  
TKR CABLE OF KENTUCKY

BY ITS ATTORNEYS  
BARAFF, KOERNER, OLENDER  
& HOCHBERG, P.C.

  
\_\_\_\_\_  
MARK J. PALCHICK

June 21, 1993

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**CERTIFICATE OF SERVICE**

I, Bernadette T. Clark, a secretary in the law offices of Baraff, Koerner, Olender & Hochberg, P.C., do hereby certify that on this 21st day of June, 1993, copies of the foregoing document were hand delivered to the following:

Ms. Donna R. Searcy  
Secretary  
Federal Communications Commission  
OMD, Room 222, Stop Code 1170  
1919 M Street, N.W.  
Washington, D.C. 20554

Commissioner James H. Quello  
Federal Communications Commission  
CM-JQ, Room 802, Stop Code 0106  
1919 M Street, N.W.  
Washington, D.C. 20554

Commissioner Sherrie P. Marshall  
Federal Communications Commission  
CM-SM, Room 826, Stop Code 0105  
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Washington, D.C. 20554

Commissioner Andrew C. Barrett  
Federal Communications Commission  
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Washington, D.C. 20554

Commissioner Ervin S. Duggan  
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Bernadette T. Clark